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**IN THE SUPREME COURT OF THE STATE OF IDAHO**

**COPY**

STATE OF IDAHO,

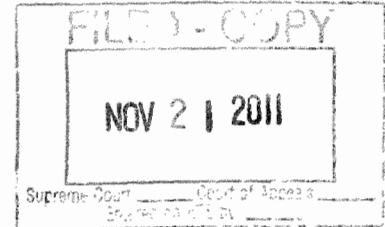
Plaintiff-Respondent,

vs.

JOSEPH RICHARD CLINTON,

Defendant-Appellant.

NO. 38755



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**BRIEF OF RESPONDENT**

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**APPEAL FROM THE DISTRICT COURT OF THE FOURTH JUDICIAL  
DISTRICT OF THE STATE OF IDAHO, IN AND FOR THE  
COUNTY OF ADA**

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**HONORABLE DEBORAH A. BAIL  
District Judge**

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**LAWRENCE G. WASDEN  
Attorney General  
State of Idaho**

**PAUL R. PANTHER  
Deputy Attorney General  
Chief, Criminal Law Division**

**JASON M. GRAY  
Deputy Attorney General  
Criminal Law Division  
P.O. Box 83720  
Boise, Idaho 83720-0010  
(208) 334-4534**

**ATTORNEYS FOR  
PLAINTIFF-RESPONDENT**

**SHAWN F. WILKERSON  
State Appellate  
Public Defender  
3647 Lake Harbor Lane  
Boise, Idaho 83703  
(208) 334-2712**

**ATTORNEY FOR  
DEFENDANT-APPELLANT**

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## STATEMENT OF THE CASE

### Nature Of The Case

Joseph Richard Clinton appeals from his sentence for Lewd Conduct with a Minor Under 16.

### Statement Of The Facts And Course Of The Proceedings

Clinton lured seven year old N.C. into his trailer house by inviting N.C. and her four year old brother inside to see his puppies. (PSI, pp.1-2.<sup>1</sup>) N.C.'s brother did not enter the trailer because he was scared. (PSI, p.2.) Clinton played "freeze tag" with N.C. and he touched N.C.'s vaginal area, skin to skin. (PSI, pp.2-3.) After N.C. left Clinton's trailer, Clinton went into his bedroom and masturbated. (PSI, p.3.) Clinton told law enforcement officers that he felt he needed treatment because it helped with "the urges." (PSI, p.3.) "Clinton admitted being attracted to children and said he fantasized about little girls all of the time." (PSI, p.3.)

A grand jury indicted Clinton for Lewd Conduct with a Minor Under 16. (R., pp.24-25.) The state sought a persistent violator sentencing enhancement based on Clinton's prior conviction for Lewd Conduct with a Minor Under 16.<sup>2</sup> (R., pp.41-42.) Clinton's trial counsel moved to have Clinton committed based on the competency evaluation Dr. Beaver performed, which indicated that Dr. Beaver had reservations about Clinton's competency to stand trial. (R., pp.47-48; 8/30/10

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<sup>1</sup> PSI page numbers correspond with the page numbers of the electronic file "ClintonPSI.pdf."

<sup>2</sup> Clinton pled guilty to having anal/genital contact with an eight year old boy on 2 or 3 occasions. (PSI, pp.115-16.) During the investigation of that crime, Clinton "told police he molested about fifty (50) children in a hundred different situations." (PSI, p.9.)

Psychological/Competency Evaluation, p.8.) Thereafter, Dr. Beaver reviewed a videotape of Clinton's interview with law enforcement officers and audio recordings of Clinton's phone calls from jail. (10/13/10 Psychological/Competency Evaluation Amended Report, pp.2-3.) Based on this additional information, Dr. Beaver concluded that Clinton was competent to stand trial because Clinton "did not appear to be as significantly impaired with regard to his memory abilities and episodes of confusion" as Dr. Beaver first observed when he examined Clinton. (Id. at 3-4.)

Pursuant to a plea agreement, Clinton pled guilty to Lewd Conduct with a Minor Under 16 and the state dismissed the persistent violator enhancement. (R., pp.57-64; Tr., p.11, L.4 - p.13, L.13; p.16, Ls.1-3.) The state agreed to recommend a 25 year sentence with three years fixed, and either probation or a period of retained jurisdiction if Clinton's psychosexual evaluation indicated that he was amendable to treatment. (Tr., p.13, L.15 - p.14, L.7.) The district court ordered a psychosexual evaluation and a social/sexual assessment and Clinton's trial counsel stipulated to providing Clinton's prior competency evaluations to the psychosexual evaluator.<sup>3</sup> (PSI, pp.8, 15-36; R., pp.65-66; Tr., p.34, L.23 - p.35, L.22.) The psychosexual evaluation and the social/sexual assessment were both provided to the district court prior to sentencing. (PSI, p.8.) The district court imposed a unified sentence of 20 years with three years fixed and ordered the sentence executed. (R., pp.68-69; Tr., p.53, L.24 - p.54, L.3.) The district court

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<sup>3</sup> Clinton is not challenging the use of his competency evaluations in the presentence process on appeal because he waived his Fifth Amendment rights prior to sentencing. (Appellant's brief, p.3.)

“specifically recommend[ed] that the Defendant participate in Sex Offender treatment while incarcerated.” (R., p.69; Tr., p.54, Ls.22-25.) Clinton filed a notice of appeal timely from the judgment. (R., pp.71-73.) Clinton filed a timely I.C.R. 35 motion for reduction of sentence, which the district court denied. (R., p.75; Order Denying Motion for Reconsideration Under ICR 35, pp.1-2 (augmentation).) Clinton also filed a second I.C.R. 35 Motion, which the district court denied. (Motion for Correction or Reduction of Sentence, ICR 35 (augmentation).)<sup>4</sup>

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<sup>4</sup> Clinton is not challenging the denial of either of his I.C.R. 35 Motions on appeal (Appellant’s brief, p.4.)



## ISSUES

Clinton states the issues on appeal as:

1. Did the district court abuse its discretion and act in manifest disregard for the pertinent provisions of I.C.R. 32 and the requirements of I.C. § 19-2522, when it failed to *sua sponte* order a mental health evaluation of Mr. Clinton prior to sentencing?
2. Did the district court abuse its discretion when it imposed a unified sentence of twenty years, with three years fixed, upon Mr. Clinton following his plea of guilty to lewd conduct with a minor under sixteen?

(Appellant's brief, p.5.)

The state rephrases the issues as:

1. Clinton did not request a separate I.C. § 19-2522 psychological evaluation and the district court did not order one. Has Clinton failed to claim or demonstrate fundamental error in sentencing?
2. Has Clinton failed to show that the district court abused its sentencing discretion?

## ARGUMENT

### I.

#### Clinton Has Failed To Claim Or Demonstrate Fundamental Error In Sentencing

##### A. Introduction

Clinton underwent a psychosexual evaluation, a competency evaluation, and a social/sexual assessment prior to sentencing. (PSI, pp.15-36; 8/30/10 Psychological/Competency Evaluation, pp.1-9.) Clinton argues that the district court manifestly disregarded I.C.R. 32 by not ordering a separate mental health evaluation pursuant to I.C. § 19-2522. (Appellant's brief, pp.6-15.) This argument fails because it was not preserved by objection and Clinton has not claimed, much less shown, that the asserted error is fundamental.

##### B. Standard Of Review

"It is a fundamental tenet of appellate law that a proper and timely objection must be made in the trial court before an issue is preserved for appeal." State v. Carlson, 134 Idaho 389, 398, 3 P.3d 67, 76 (Ct. App. 2000). Whether the issue was preserved is a "threshold" inquiry. State v. Stevens, 115 Idaho 457, 459, 767 P.2d 832, 834 (Ct. App. 1989). Absent a timely objection, the appellate courts of this state will only review an alleged error under the fundamental error doctrine. State v. Perry, 150 Idaho 209, 227, 245 P.3d 961, 979 (2010). Review under the fundamental error doctrine requires Clinton to demonstrate the error he alleges: "(1) violates one or more of [his] unwaived constitutional rights; (2) plainly exists (without the need for any additional information not contained in the appellate record, including information as to

whether the failure to object was a tactical decision); and (3) was not harmless.”

Perry, 150 Idaho at 228, 245 P.3d at 980.

C. Clinton Has Failed To Show Fundamental Error In The Psychological Evidence Before The Court At Sentencing

Clinton claims that the district court erred by not ordering an additional psychological exam prior to sentencing, asserting that appellate review is appropriate because there has been an alleged “manifest disregard” of a procedural rule. (Appellant’s brief, p.6.) While there is authority from the Idaho Court of Appeals allowing such review, see, e.g., State v. Jones, 132 Idaho 439, 442, 974 P.2d 85, 88 (Ct. App. 1999), the Idaho Supreme Court has recently called such authority into doubt. In State v. Perry, 150 Idaho 209, 226, 245 P.3d 961, 978 (2010), the Court stated that “where an error has occurred at trial and was not followed by a contemporaneous objection, such error shall only be reviewed where the defendant demonstrates to an appellate court that one of his unwaived constitutional rights was plainly violated.” The language of the Idaho Supreme Court is unambiguous. Unpreserved claims of error “shall only be reviewed” on appeal if the record shows a plain violation of a defendant’s “unwaived constitutional rights.” As such, Clinton must demonstrate that the error he claims is fundamental under the test employed by Idaho Supreme Court because Clinton did not request an additional psychological evaluation or object to the lack of such an evaluation prior to or at the time of sentencing.

Clinton has failed to show fundamental error. He has failed to show that the type or nature of the psychological evaluation considered at sentencing is of

constitutional significance. Furthermore, there is nothing in the record to indicate that a different evaluation than the ones conducted prior to sentencing would have had any effect on the ultimate sentence imposed.

Even if psychological evaluations at sentencing hearings are somehow exempt from the Idaho Supreme Court's declaration that only fundamental error will be reviewed in the absence of an objection, the record shows that there was no manifest disregard for the rules and statutes governing such evaluations. In State v. Toohill, 103 Idaho 565, 566, 650 P.2d 707, 708 (Ct. App. 1982), the Idaho Court of Appeals held that regardless of fundamental error "[m]anifest disregard" of I.C.R. 32 "could not be countenanced on appeal without diminishing the reputation of the judicial process." The appellate court could therefore review for manifest disregard of I.C.R. 32 "in order to protect the integrity of the courts." Id. "However, we will not review a contention, made for the first time on appeal, that compliance with the rule was simply inadequate - e.g., that the [PSI] report should have developed a particular point further, or that certain information was incomplete or inaccurate. Those are matters to be raised at the sentencing hearing." Id. at 566-67, 650 P.2d at 708-09. Review of the record shows no manifest disregard of I.C.R. 32 or I.C. § 19-2522 because Clinton's claim goes only to the adequacy of the evaluations, not whether there was manifest disregard of the applicable law.

Idaho Code § 19-2522(1) states that "[i]f there is reason to believe the mental condition of the defendant will be a significant factor at sentencing and for good cause shown," the court must appoint a psychiatrist or psychologist to

evaluate and report upon the defendant's mental condition to inform the court's sentencing decision. That statute also states that the report of the examination must include the following:

- (a) A description of the nature of the examination;
- (b) A diagnosis, evaluation or prognosis of the mental condition of the defendant;
- (c) An analysis of the degree of the defendant's illness or defect and level of functional impairment;
- (d) A consideration of whether treatment is available for the defendant's mental condition;
- (e) An analysis of the relative risks and benefits of treatment or nontreatment;
- (f) A consideration of the risk of danger which the defendant may create for the public if at large.

I.C. § 19-2522(3).

"The requirements of I.C. § 19-2522 are complimented by Idaho Criminal Rule 32 which specifies the elements to be included in the presentence report. These elements include information on the health of the defendant where relevant to the sentencing decision, I.C.R. 32(b)(8), and, where appropriate, the presentence investigator's analysis and recommendation regarding a psychological examination, I.C.R. 32(b)(10)." State v. Jockumsen, 148 Idaho 817, 822, 229 P.3d 1179, 1184 (Ct. App. 2010). "A psychological evaluation is not required in every case where the defendant claims some mental illness or disability." Id. "Rather, the decision of whether to obtain a psychological evaluation lies within the sentencing court's discretion." Id. (citing I.C.R. 32(d); State v. Durham, 146 Idaho 364, 366, 195 P.3d 723, 725 (Ct. App. 2008); State

v. Craner, 137 Idaho 188, 189, 45 P.3d 844, 845 (Ct. App. 2002); State v. Jones, 132 Idaho 439, 442, 974 P.2d 85, 88 (Ct. App. 1999)). “As with any discretionary determination, however, the district court's action must be consistent with the applicable legal standards.” State v. McFarland, 125 Idaho 876, 879, 876 P.2d 158, 161 (Ct. App. 1994). “A district court's election not to order a psychological evaluation will be upheld on appeal if the record can support a finding that there was no reason to believe a defendant's mental condition would be a significant factor at sentencing or if the information already before the court adequately met the requirements of I.C. § 19-2522(3).” Jockumsen, 148 Idaho at 822, 229 P.3d at 1184.

Clinton claims that “the materials before the district court did not function as an adequate substitute for a full I.C. § 19-2522 mental health evaluation.” (Appellant’s Brief, p.14.) Clinton only specifically identifies two of the statutory requirements he claims were omitted from the evaluations. (Appellant’s brief, pp.13-14 (claiming there was no evaluation of “whether treatment is available for the defendant’s mental condition” and there was no “analysis of the relative risks and benefits of treatment or nontreatment.”<sup>5</sup>) Clinton’s complaint merely goes to the adequacy of the evaluation, and therefore may not be brought for the first time on appeal. Toohill, 103 at 566-67, 650 P.2d at 708-09 (contentions that compliance with the rule was inadequate must be raised at the sentencing hearing). Furthermore, Clinton has failed to demonstrate that the district court

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<sup>5</sup> Clinton mostly asserts that the district court drew incorrect conclusions from the evaluation. (Appellant’s brief, pp. 11-13.) Whether the sentencing court drew correct conclusions at sentencing is a different question from whether the district court manifestly disregarded I.C.R. 32 by not ordering a new evaluation.

erred by not ordering an additional psychological evaluation prior to sentencing under either the fundamental error standard or the manifest disregard standard. The record establishes that the district court had ample information about Clinton's psychological condition.

In Clinton's PSI, the presentence investigator summarized Clinton's physical and mental health condition. (PSI, pp.7-8.) Clinton reported that he thought he was in good health, but he felt that "being very hard of hearing limited his activities." (PSI, p.7.) Clinton stated that he was involved in sex offender counseling "a long time ago" and he indicated that he thought he could benefit from counseling again. (PSI, p.7.) The presentence investigator noted that it was difficult communicating with Clinton because of Clinton's "inability to hear well." (PSI, p.7.) As part of the presentence investigation process, Clinton was assessed with the Level of Service Inventory Revised ("LSI-R"). (PSI, p.10.) According to Clinton's results on that test, some identified risk factors that may contribute to his criminal behavior include "unstructured use of leisure/recreation time; emotional/personal issues; limited education and lack of employment; poor financial situation; and attitude/orientation." (PSI, p.10.) The presentence investigator reviewed Clinton's earlier PSI, which stated that Clinton was "not amiable [sic] to any kind of therapy. He is not intellectually able to gain insight or make behavioral changes." (PSI, pp.7-8.) The earlier PSI also stated that Clinton "is a threat to children in the general public." (PSI, p.8.)

The presentence investigator summarized Clinton's psychosexual evaluation and his social/sexual assessment and recommended that "a lengthy

period of incarceration would protect society, deter Mr. Clinton from sexually offending children, hold him accountable for his actions against this victim, and provide the opportunity for Mr. Clinton to participate in counseling and treatment in a secure environment.” (PSI, pp.8-10.) The presentence investigator did not give any indication that additional psychological testing was necessary, which is reasonable considering the extensive psychological evaluations that were performed prior to sentencing. (See PSI, p.10-11 (discussing “Treatment Programs and/or Optional Recommendations”).)

The first psychological evaluation was performed by Dr. Beaver in order to determine whether Clinton was competent to stand trial. (8/30/10 Psychological/Competency Evaluation, p.1.) Over the course of three days, Dr. Beaver interviewed Clinton and Clinton underwent a psychometric test battery that included 16 separate psychological tests. (Id. at 1-2.)

After performing these tests, Dr. Beaver thoroughly discussed Clinton's physical and mental condition:

Richard Clinton was seen and evaluated in a conference room at the Ada County Jail. He ambulated somewhat slowly but independently. He had to be escorted to and from the testing room reportedly because he could not locate it by himself. He does wear eyeglasses. He does wear a hearing aid that he switches back and forth between his ears. His basic personal hygiene and grooming appeared adequate.

During the course of interviewing and testing, he was alert but very distractible. He presented with very poor hearing, which resulted in instructions having to be repeated several times. He also would often present as if he understood what was being said but it would become quite clear that he had little understanding. Even when he appeared to understand a basic instruction, he was not always successful in following through and responding, meandering in his behavior. Expressively, he could communicate



his basic thoughts and ideas but did have some articulation problems at times because of poor dentures.

Interpersonally, he maintained eye contact with the examiner. He appeared to attempt the tests required of him. However, he was emotional during much of my interview time, often becoming tearful and requiring time to regain his composure. Also, he had a tendency to get focused on specific issues or concerns and it was difficult for him to get back to the topic at hand. Insight appeared poor. He was oriented to person and place but was not consistently oriented to time.

(Id. at 2-3.)

Dr. Beaver then discussed Clinton's background and Clinton's ability to understand the legal process. (Id. at 3-5.) Dr. Beaver analyzed the degree of Clinton's mental illness and the level of Clinton's functional impairment by analyzing the neuropsychological test results. (Id. at 5-9.) Dr. Beaver's overall impressions of Clinton were that:

Mr. Clinton presents as being quite impaired. He has poor hearing that interferes with communication. He appears to be relatively limited in his communication abilities even without the hearing problem. I suspect that historically, he has functioned in the low end of dull normal. This certainly would be consistent with his reported history of only attending school into the eighth grade and essentially being unable to read or write with any functional ability.

He now presents with much greater difficulty. More specifically, he presents with poor ability to stay focused. He has significant difficulties with retaining new information. He is easily confused and overwhelmed.

(Id. at 7.)

Dr. Beaver diagnosed Clinton with Dementia and Adjustment Disorder with Depressed Mood. (Id.) Dr. Beaver stated that it was "difficult to determine what the source of [Clinton's] neurocognitive difficulties would be" and noted that

if “Clinton has a primary dementia such as the Alzheimer’s type, I anticipate it will be extremely difficult to restore Mr. Clinton to a functional competence.” (Id. at 7-9.)

However, Dr. Beaver ultimately concluded that Clinton was competent to stand trial after reviewing a videotape of Clinton’s interview with law enforcement officers and audio recordings of Clinton’s phone calls from jail. (10/13/10 Psychological/Competency Evaluation Amended Report, pp.2-3.) Although Dr. Beaver was never able to completely rule out a primary dementia, Dr. Beaver was able to inform the district court of the severity of Clinton’s mental illness, as well as Clinton’s level of functional impairment. (Id. at 2-5.) Dr. Beaver was also able to analyze the treatment options available for Clinton’s mental health condition. (Id. at 4-5.)

In addition to the two Psychological/Competency Evaluation reports prepared by Dr. Beaver, the district court ordered a psychosexual evaluation and a social/sexual assessment. (PSI, pp.8, 15-36; R., pp.65-66.) The psychological information contained in those reports is extremely thorough. (PSI, pp.15-36.) During the psychosexual evaluation, Dr. Johnston reviewed a considerable amount of information regarding Clinton’s mental condition and Dr. Johnston used that information to determine Clinton’s “DSM-IV diagnosis, risk level to re-offend, capacity for treatment, recommendation regarding violent predator status, conclusions, and suggestions for management.” (PSI, pp.24-26.) During the psychosexual evaluation, Dr. Johnston administered three psychological tests in addition to the 16 previous psychological tests performed by Dr. Beaver, but the

new tests did not produce valid results due to “what appeared to be low intellectual functioning.” (PSI, p.24.) Dr. Johnston analyzed Clinton’s mental condition and psychological symptoms. (PSI, p.25.) Dr. Johnston diagnosed Clinton with Pedophilia, Sexual Abuse, Adjustment Disorder with Anxious Mood, and Borderline Intellectual Functioning (Possibly Mental Retardation). (PSI, pp.25-26.) Dr. Johnston noted that “individuals who have low intellectual functioning could sometimes act on their inappropriate sexual impulses purely based on incapacity to contain sexual desires, and not related to personality issues.” (PSI, p.25.) Dr. Johnston concluded that Clinton poses a “high risk to re-offend” based on numerous psychological and sexual variables that Dr. Johnston considered. (PSI, pp.29-32.)

After concluding that Clinton posed a high risk of reoffending, Dr. Johnston analyzed the potential benefit of treatment and discussed whether treatment was available for Clinton’s mental condition. (PSI, pp.34-36.) Dr. Johnston recommended sexual offender treatment in a “structured environment” along with psychological measures and polygraph examinations to track the progress and honesty of Clinton during treatment. (PSI, pp.34-36.) However, Dr. Johnston noted that Clinton’s “limited intellect might create limitations regarding his capacity to comprehend topics discussed in treatment and apply them to his life.” (PSI, p.33.)

Despite all of the psychological information regarding Clinton’s mental condition that the district court had before it prior to sentencing, Clinton claims that the district court was required to *sua sponte* order an additional mental

health evaluation because "there never was a mental health evaluation which actually diagnosed the extent of Mr. Clinton's dementia." (Appellant's brief, p.13.) Clinton primarily bases this argument on his opinion that the district court denied his "request for probation or a period of retained jurisdiction based solely on Mr. Clinton's 'dementia,' and the perceived negative impact it would have on his amenability to treatment." (Appellant's brief, p.6.) Clinton's argument is without merit.

The specific extent of Clinton's dementia was not a "significant factor at sentencing" because it was not a "key underlying factor in the defendant's commission of the crime." See State v. Shultz, 149 Idaho 285, 288, 233 P.3d 732, 735 (Ct. App. 2010) (stating that "[a]lthough not exclusive, a defendant's mental condition can be a significant factor at sentencing when that condition may be a key underlying factor in the defendant's commission of the crime, especially when the actions are a serious departure from the defendant's history and character."). The crime at issue here was not a departure from Clinton's history or character in any way. Clinton was previously convicted of Lewd Conduct with a Minor Under 16,<sup>6</sup> which is the same crime he was convicted of in this case. (PSI, pp.4-5.) His prior offense was "part of a continuing pattern of behavior" that consisted of Clinton having sexual contact with children and that pattern of conduct continued when he committed the instant offense. (PSI, p.117.) Clinton has a "willingness to groom and manipulate in order to satisfy his

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<sup>6</sup> During the investigation of that crime, Clinton told law enforcement officers that he "had sex with approximately 50 different children" and he "advised that he has had a problem with children for more than 20 years and was relieved when he was finally able to tell someone about his problems." (PSI, p.138.)

sexual desires” and “his most recent inappropriate sexual behavior was highly concerning, and suggested fairly deep-seated attitudes that supported child molestation, beliefs that support manipulation of others, poor impulse control, sexual entitlement, and callousness towards his victim.” (PSI, p.31.)

Furthermore, even assuming that the Extent of Clinton’s dementia was a significant factor at sentencing, the district court did not manifestly disregard I.C.R. 32 or I.C. § 19-2522 because it had had ample evidence regarding Clinton’s mental condition and the district court appropriately considered Clinton’s mental condition as it related to Clinton’s prospects for rehabilitation. (See Tr., p.47, L.12 - p.55, L.5.; see also Order Denying Motion for Reconsideration Under ICR 35, pp.1-2 (augmentation). As stated recently by the Idaho Supreme Court in State v. Windom:

When evaluating the defendant's prospects for rehabilitation, trial judges are asked to make a probabilistic determination of a human being's likely future behavior. The reality is that a sentencing judge will never possess sufficient information about the defendant's character, life circumstances and past behavior so as to project future behavior with unerring accuracy. To the contrary, the factual determination of the defendant's probability of re-offense will always be based upon limited data. This extraordinarily difficult task is made more difficult because it is merely one factor to be considered by the sentencing judge-and a subordinate consideration at that. State v. Moore, 78 Idaho 359, 363, 304 P.2d 1101, 1103 (1956) (“Rehabilitation is not the controlling consideration . . . . The primary consideration is, and presumptively always will be, the good order and protection of society.”).

150 Idaho 873, 253 P.3d 310, 316 (2011).

It was clear from both the competency evaluation and the psychosexual evaluation that Clinton’s possible dementia and his low intellectual functioning could have an effect on Clinton’s prospects for rehabilitation. However, the

district court never found that Clinton's dementia was "untreatable" as Clinton argues. (Appellant's brief, p.13.) Although the district court expressed its concerns about Clinton's ability to control his impulses and his ability to be rehabilitated, the district court followed Dr. Johnston's suggestions and recommended treatment in a "secure facility" where Clinton "would not have any access to children." (Tr., p.51, L.11 - p.54, L.10; PSI, p.32.) The district court did not "solely focus[] on Mr. Clinton's possible dementia when it refused his request for probation or period of retained jurisdiction." (Appellant's brief, p.15.) The district court denied Clinton's request for probation primarily out of concern for the safety of the community and the district court denied his request for a rider because the district court did not think a rider would be appropriate based on Clinton's prior criminal history. (Tr., p.52, Ls.3-7; p.53, Ls.6-10.) As such, it was unnecessary for the district court to order an additional psychological evaluation and the district court did not manifestly disregard I.C.R. 32 or I.C. § 19-2522.

Clinton next relies on State v. Jockumsen, 148 Idaho 817, 229 P.3d 1179 (Ct. App. 2010), for his contention that the district court erred when it failed to *sua sponte* order an additional mental health evaluation. (Appellant's brief, pp.14-15.) However, that case is distinguishable. In Jockumsen, the district court did not order any psychological evaluations prior to sentencing other than the defendant's competency evaluations. 148 Idaho at 819, 229 P.3d at 1181. The district court pronounced a sentence, but expressed a need for additional information on the defendant's mental health and decided to retain jurisdiction for

180 days and request a mental health evaluation during the retained jurisdiction period. Id.

After determining that the defendant's mental condition was a significant factor for sentencing, the Idaho Court of Appeals held that the district court did not sufficiently comply with I.C. § 19-2522 because that "statute requires that the evaluation be conducted *before* sentencing so that the trial court will have the benefit of the evaluator's insights in fashioning an appropriate sentence." Id. at 823, 229 P.3d at 1185 (emphasis original).

Here, the district court had significantly more information regarding Clinton's mental condition than the district court in Jockumsen had regarding the defendant. In addition to two psychological/competency evaluation reports, the district court had a comprehensive psychosexual evaluation and a social/sexual assessment. Furthermore, the district court had all of these psychological evaluations prior to sentencing. Therefore, the holding in Jockumsen is inapplicable to the facts of this case

Clinton's claim that the district court should have *sua sponte* ordered an additional psychological evaluation pursuant to I.C. § 19-2522 should not be considered on appeal because there is neither a claim nor a showing of fundamental error. The psychological evaluations that the district court ordered prior to sentencing were more than sufficient to satisfy the requirements of I.C. § 19-2522. Even if this Court were to apply the "manifest disregard" standard and review non-fundamental error in the absence of an objection, Clinton has failed to

show that the district court manifestly disregarded I.C.R. 32 or I.C. § 19-2522 in light of the facts shown in the record.

## II.

### Clinton Has Failed To Show That The District Court Abused Its Sentencing Discretion

#### A. Introduction

Clinton asserts that the district court abused its discretion when it imposed a unified sentence of 20 years with three years fixed. (Appellant's brief, p.16.) Clinton has failed to establish an abuse of sentencing discretion.

#### B. Standard Of Review

The length of a sentence is reviewed under an abuse of discretion standard considering the defendant's entire sentence. State v. Oliver, 144 Idaho 722, 726, 170 P.3d 387, 391 (2007) (citing State v. Strand, 137 Idaho 457, 460, 50 P.3d 472, 475 (2002); State v. Huffman, 144 Idaho 201, 159 P.3d 838 (2007)). It is presumed that the fixed portion of the sentence will be the defendant's probable term of confinement. Oliver, 144 Idaho at 726, 170 P.3d at 391 (citing State v. Trevino, 132 Idaho 888, 980 P.2d 552 (1999)). Where a sentence is within statutory limits, the appellant bears the burden of demonstrating that it is a clear abuse of discretion. State v. Baker, 136 Idaho 576, 577, 38 P.3d 614, 615 (2001) (citing State v. Lundquist, 134 Idaho 831, 11 P.3d 27 (2000)).



C. Clinton Has Failed To Show That The District Court Abused Its Sentencing Discretion

Clinton asserts that the district court abused its discretion by ordering the underlying sentence of 20 years with three years fixed executed in light of his mental health issues, his amenability to treatment, support from friends, and his employment background. (Appellant's brief, pp.16-20.)

To bear the burden of demonstrating an abuse of discretion, the appellant must show that the sentence is excessive under any reasonable view of the facts. Baker, 136 Idaho at 577, 38 P.3d at 615. A sentence is reasonable, however, if it appears necessary to achieve the primary objective of protecting society or any of the related sentencing goals of deterrence, rehabilitation or retribution. Id.

In fashioning an appropriate sentence, the district court considered the objectives of sentencing, the seriousness of Clinton's offense, his criminal history and the danger he presents to children in the community. (Order Denying Motion for Reconsideration Under ICR 35, pp.1-2 (augmentation); Tr., p.47, L.12 - p.50, L.22.) The district court also considered Clinton's amenability to treatment, his employment history, and his "very high risk to reoffend." (Tr., p.50, L.23 - p.53, L.23.) Clinton's criminal history includes a prior conviction for Lewd Conduct with a Minor Under 16. (PSI, pp.4-5.) That offense was "part of a continuing pattern of behavior" that consisted of Clinton having "anal/genital contact, oral/genital

contact and attempted intercourse” with at least three children.<sup>7</sup> (PSI, p.117.) In addition to those victims, Clinton admitted to molesting about 50 children in over a hundred incidents. (PSI, p.118.) Clinton provided the names of several of those children and “advised that he generally prefers rectal sex with boys.” (PSI, p.134.) Clinton had access to the children “through family and employment with a carnival.” (PSI, p.9.)

During Clinton’s psychosexual evaluation, Dr. Johnston asked Clinton if he believed his victims had the potential for negative consequences because of their sexual interactions with Clinton. (PSI, p.27.) Clinton responded, “[t]hat’s a hard one to figure out. I think they might just forget about it.” (PSI, p.27.) Dr. Johnston determined that Clinton poses a “high risk” to reoffend based, in part, on Clinton’s “pedophilia and propensity towards sexual abuse.” (PSI, pp.29-31.) Dr Johnston stated:

He seemed sexually attracted to both male and female children, coupled with an incapacity to contain his urges, in addition to willingness to groom and manipulate in order to satisfy his sexual desires. Furthermore, one would expect that after ten years of treatment he would have better insight and capacity to contain these urges if such were to develop. Consequently, his most recent inappropriate sexual behavior was highly concerning, and suggested fairly deep-seated attitudes that supported child molestation, beliefs that support manipulation of others, poor impulse control, sexual entitlement, and callousness towards his victim . . . .

(PSI, p.31.) Based on Clinton’s high risk of reoffending, Dr. Johnston recommended that Clinton should be required to enroll in sexual offender

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<sup>7</sup> Clinton was accused of sexually abusing five children. (PSI, p.117.) Clinton admitted to sexually abusing three of the children, but “stated he could not recall any abuse occurring with” the other two children. (PSI, p.117).

treatment in a "structured environment." (PSI, p.34.) However, Dr. Johnston noted that "[c]onsidering the examinee had previously participated in ten years of sexual offender treatment and still re-offended, in addition to taking into account his limited intellect, there were concerns regarding how much more he could learn from sexual offender treatment." (PSI, p.33.)

The presentence investigator recommended:

At the court's discretion a lengthy period of incarceration would protect society, deter Mr. Clinton from sexually offending children, hold him accountable for his actions against this victim, and provide the opportunity for Mr. Clinton to participate in counseling and treatment in a secure environment.

(PSI, p.10.)

At Clinton's sentencing hearing, the district court stated:

I think it's really a great blessing that the child in this case was comfortable enough to tell somebody else what was going on so that we could stop something that looks like it's likely to be a very serious problem.

As far as we know, that problem is not more extensive, but it's very worrisome, because Mr. Clinton did have a significant pattern. It is very possible that the treatment was successful for a while.

But Mr. Clinton has been diagnosed by Dr. Johnston with having a serious level of this problem, which is an Axis I diagnosis of pedophilia. Under all circumstances, even with people who are younger and mentally sounder, that's a terrible diagnosis. It's a terrible diagnosis as far as risk to the community.

Dr. Johnston says that he presents a very high risk to reoffend.

(Tr., p.50, Ls.5-24.) The district court also stated:

what we have right now is a very serious issue that the defendant is suffering from dementia, which will probably worsen his ability to understand and internalize additional counseling. If the prior

counseling was successful, it appears that success appears to -- that success appears to be dimming now.

Unfortunately, I think this is a very risky picture. It really looks like possibly the emerging dementia, coupled with pedophilic disposition, is just -- is at a worsening place, and that's what would be my assessment, based on what's before me. And that, at best, he would have to start treatment in a secure facility.

It's not clear if the treatment can be successful, based upon his deteriorating condition.

And it is clear that he presents a risk to children. He is a proven risk to children in the past. He is a proven risk to children in the near past. And where he lives is a place where he's likely to be exposed to other children.

And besides which I think his abilities to control his impulses, which never was as strong as some people with the sturdier intellectual gifts, but it appears that he was able to control his impulses.

I'm afraid that what's going on for whatever reason appears to be lessening his ability to control his impulses. So I think it's unfortunate, but I think we have limited options.

(Tr., p.51, L.11 - p.52, L.16.) The district court did not "see a rider with the sexual offender assessment group as being an appropriate placement in this case" because "that is more designed for people who are coming into the system for the first time." (Tr., p.53, Ls.6-10.)

In denying Clinton's motion for reduction of sentence under I.C.R. 35, the district court further explained the reasoning behind the sentence imposed:

The defendant is a pedophile. He has extremely serious prior convictions for lewd conduct with an eight year old boy. He has admitted to molesting two other little boys. He told officers at one point that he had sex with fifty children. In this case, he lured a little girl into his trailer and played "touching games" with her which involved manual to genital contact. He says he is attracted to children and fantasizes about sex with little girls all of the time. He represents a grave risk to the safety of children. The Court's

sentence was very reasonable and fair and was designed to protect the most vulnerable members of the community.


(Order Denying Motion for Reconsideration Under ICR 35, p.2 (augmentation).)

The district court appropriately determined that a period of incarceration was necessary to protect the public and imposed a reasonable sentence. The sentence imposed was appropriate in light of the seriousness of Clinton's offense, his lack of remorse, and the danger he poses to society. Given any reasonable view of the facts, Clinton has failed to establish an abuse of sentencing discretion.

#### CONCLUSION

The state respectfully requests this Court to affirm Clinton's conviction and sentence.

DATED this 21st day of November, 2011.

  
JASON M. GRAY  
Deputy Attorney General

#### CERTIFICATE OF SERVICE

I HEREBY CERTIFY that I have this 21st day of November 2011, served a true and correct copy of the attached BRIEF OF RESPONDENT by causing a copy addressed to:

SHAWN F. WILKERSON  
DEPUTY STATE APPELLATE PUBLIC DEFENDER

to be placed in The State Appellate Public Defender's basket located in the Idaho Supreme Court Clerk's office.

  
JASON M. GRAY  
Deputy Attorney General

JMG/pm